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JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

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No. ~~902~~ MISC.

WILLIAM JOE JOHNSON, Petitioner,

v.

HARRY S. AVERY, COMMISSIONER,
DEPARTMENT OF CORRECTION,

and

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY,
NASHVILLE, TENNESSEE, Respondents.

PIERCE WINNINGHAM III
Attorney at Law
1035 Third National Bank Building
Nashville, Tennessee

KARL P. WARDEN
Associate Professor of Law
Vanderbilt Law School
Nashville, Tennessee

BRUCE E. GAGNON
Assistant Professor of Law
Vanderbilt Law School
Nashville, Tennessee

MISCELLANEOUS:

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IN THE
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No. _____

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and

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY,
NASHVILLE, TENNESSEE, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM JOE JOHNSON, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on August 31, 1967.

CITATIONS OF OPINIONS BELOW

The memorandum opinion of the District Court, printed in Appendix B hereto, infra, p. 13, is reported in 252 F. Supp. 783 (M.D. Tenn. 1966). The opinion of the Circuit Court of Appeals, as yet unreported, is printed in Appendix B hereto, infra, p. 18.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 31, 1967. Appendix B, infra, p. 18. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether a state prison regulation which prohibits a prison inmate from assisting a fellow inmate in preparing petitions for writ of habeas corpus and other legal papers, when no other help is available, is invalid under 28 U.S.C. § 2242 or the United States Constitution.

(2) Whether a federal district court may intervene with a writ of habeas corpus to prevent prison officials from enforcing disciplinary sanctions against a prisoner for violation of a prison regulation which conflicts with federal law.

STATUTE INVOLVED

The statutory provision involved is 28 U.S.C. § 2242 (1964), printed in Appendix A, infra, p. 12.

STATEMENT OF FACTS

Petitioner, a prisoner in the Tennessee State Penitentiary, was placed in solitary confinement for violating a prison regulation which forbids inmates to "advise, assist or otherwise contract to aid" another inmate, either with or without a fee, in the preparation of petitions for habeas corpus or other legal papers. After serving eleven months in solitary confinement, petitioner sought relief in federal district court under the Civil Rights Act of 1964. Construing the motion as a petition for habeas corpus, the District Court held that the prison regulation conflicted with 28 U.S.C. § 2242, and had the effect of suppressing the assertion of federal constitutional rights in court by prisoners who are incapable of drafting

their own petitions; the Court therefore ordered the release of petitioner from solitary confinement. On appeal, the Court of Appeals for the Sixth Circuit reversed; while that Court agreed with the District Court that petitioner had standing to question the validity of the prison regulation, and that a petition for habeas corpus was an appropriate procedure to attack the validity of disciplinary confinement, the Court held that judicial review of the internal affairs of a prison should be granted only in cases which clearly demonstrate an interference with fundamental constitutional rights. The Court went on to say that Tennessee has an undisputed right to regulate the practice of law within its boundaries, and that neither the Constitution nor 28 U.S.C. §2242 provided a prison inmate a right to assist another inmate in legal matters.

REASONS FOR GRANTING THE WRIT

Both opinions below indicate that this is a case of first impression and undoubted importance. It deals with the power of prison officials, not reasonably to regulate, but absolutely to prohibit, the activities of "jailhouse lawyers." It should be noted that while an indigent prisoner may be able to obtain the assistance of court-appointed counsel in both federal and Tennessee habeas corpus proceedings after he has presented a case with sufficient merit to entitle him to a hearing (see 28 U.S.C. §1915(d) (1964) and Tenn. Code Ann. §40-2014 (1966)), there is no provision under either law for the appointment of counsel in the preparation of petitions. It is in this

context that the prison regulation should be viewed. From its experience with habeas corpus petitions, the District Court noted that many prisoners, inarticulate, illiterate or of substandard intelligence, would be "totally incapable of preparing an intelligible petition" without assistance of some kind. The District Court also observed that the prison officials have not provided means through which illiterate prisoners could obtain access to qualified attorneys. Of course, the same educational, psychological or mental deficiencies which make it impossible for a prisoner independently to draft an intelligible petition would also make it unlikely that he could draft a letter which may arouse an attorney's interest. A further impediment to outside assistance by an attorney is the fact that the great majority of prisoners are indigent and unable to pay a legal fee, and few attorneys are willing to travel to the state penitentiary to listen to the story of an indigent prisoner. In this context, it becomes even more acute that a prisoner who is incapable of drafting his own petitions receive the assistance of another prisoner. Petitioner believes that the effect of the prison regulation is to block access to federal or state courts for many prisoners; such a regulation strikes at the very threshold of the only entrance to the courts. Petitioner further believes that the regulation conflicts with decisions of this Court to the effect that prison officials may not block prisoners' access to federal courts. See, e.g., Dowd v. United States ex rel Cook, 340 U.S. 206 (1951); White v. Ragen, 324 U.S. 700 (1945);

Cochran v. Kansas, 316 U.S. 255 (1942); Ex Parte Hull, 312 U.S. 546 (1941).

In 1948, 28 U.S.C. §2242 was amended to read: "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." (Emphasis added to show amendment). The District Court construed this provision to grant a federal statutory right to assistance by fellow prisoners in preparing petitions in the absence of an acceptable alternative means of assistance. Petitioner believes that since §2242 authorizes a person to "sign and verify" a petition for another, and in effect present the petition to the Court, that, a fortiori the section authorizes such a person to assist in drafting a petition. Moreover, the amendment to §2242 was not designed to restrict common law rights in habeas corpus petitions, but was intended to reflect "the actual practice of the courts." See H.R. Rep. No. 308, 80th Cong., 1st Sess., A 178 (1947). Thus, even if the amendment to §2242 does not create a federal right to assist in preparing a federal habeas corpus petition, the amendment would not, and perhaps could not, affect the existence of such a right under general federal habeas corpus law. Numerous decisions affirm the right of one party to petition for habeas corpus for a second party if it is shown that the second party was incapable of filing his own petition. See, e.g., Nash v. MacArthur 184 F. 2d 606 (D.C. Cir. 1950); Collins v. Traeger, 27 F. 842 (9th Cir. 1928);

United States ex rel Bryant v. Houston, 273 Fed. 915 (2d Cir. 1921). Indeed, this court has recognized the rule permitting a properly authorized third party to appear in behalf of another who is incapable of presenting a petition, see Rosenberg v. United States, 346 U.S. 273, 291 (1953) (dictum), and has heard cases on habeas corpus raised by third persons: See, e.g., United States ex rel Accardi v. Shaughnessy, 347 U.S. 260, 263 (1954); United States ex rel Toth v. Quarles, 350 U.S. 11 (1955). This rule is designed to insure that habeas corpus is equally available to persons who are incapable of preparing a petition, and since the rule permits one person to prepare a petition and appear before the court for another, the rule should protect a person who assists in preparing a petition even though he cannot, because of his status, argue before the court. While the purpose of the rule is to protect the rights of the incapacitated or illiterate prisoner to receive assistance, it necessarily creates a concomitant right in others to give assistance. Otherwise the right to receive assistance would in most cases be rendered ineffective, since to deny the person giving assistance is to deny the prisoner who cannot help himself. Cf. Edwards v. California, 314 U.S. 160 (1941), where defendant's conviction for assisting in indigent nonresident to enter the state was struck down, even though, as noted by Douglas, J., concurring, the primary right to freedom of movement was in the person assisted.

The Court of Appeals upheld the validity of the prison regulation on the basis of the "undisputed right" of individual states to regulate the practice of law within its boundaries. However, recent cases indicate there is a limit on the state's power to regulate the practice of law when the

regulation has the practical effect of restricting the ability of unsophisticated persons to seek legal redress in courts. See Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963). Moreover, as mentioned earlier, petitions of habeas corpus presented by a "next friend" have long been permitted by the courts, (see e.g., Nash v. MacArthur, 184 F.2d 606 (D.C.Cir. 1950); Collins v. Traeger, 27 F.2d 842 (9th Cir. 1928); United States ex rel Bryant v. Houston, 273 Fed. 915 (2d Cir. 1921)), and this practice has never been viewed as an unauthorized practice of law. Even in Tennessee state courts, petitions prepared by other inmates have been permitted. See Tennessee ex rel Dawson v. Henderson, a 1967 unreported decision of the Tennessee Supreme Court (printed in Appendix C, infra p. 22), in which the court held that a hearing must be granted on a petition which, as the court acknowledged, was prepared by a prison "writ writer" (a copy of that petition, in fact prepared by William Joe Johnson, petitioner in this case, is printed in Appendix C, infra, p. 28). More important, the traditional reason given for the state's authority to regulate the practice of law is that the state has an interest in protecting unwary clients from the consequences of bad advice given by unscrupulous or ill-trained attorneys. Legal advice in preparing a petition for habeas corpus, however, whether by trained counsel or by a fellow prisoner, will not have permanent detrimental effects, since the petitioner is always able to present later petitions. Also, unlike the practice of law generally, the preparation of petitions, such as in this case,

is directly within the supervision of the court, which is with equal vigor to state petitions, in view of the fact in a position to prevent abuses and limit the consequences that a prisoner, in order to attack a conviction by federal habeas corpus, must exhaust his state court remedies. It must also be recognized that a proper petition for habeas corpus is only a clear and simple statement of the facts which merit relief; thus, an acceptable federal writ if he cannot have assistance in the state. A petition can be prepared by a person with a minimum of legal knowledge. Of course, the best legal advice can be received from a licensed attorney, but under the circumstances, prisoner assistance is certainly preferable to the alternative of no assistance at all.

The prison regulation in this case makes no distinction between federal court and state court petitions, and the record does not show whether petitioner was disciplined for assisting in a federal or a state court petition. Petitioner believes this should not matter. As to federal court petitions, the state should not be permitted to discipline a prisoner for conducting an activity which is authorized and acknowledged by a federal district court, since the practice of law before a federal court is peculiarly within the province and supervision of the federal court and should not be subject to state regulation. See Sperry v. Florida, 373 U.S. 379 (1963); Spanos v. Skouras, 364 F.2d 161 (2d Cir. 1966); Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964). Furthermore, if there is a right to assist in federal court but not state court petitions, the prison regulation, absolute on its face, should be held invalid because of its inhibitive effects on protected activity (assistance in federal petitions), even though petitioner was disciplined for assisting in a state petition. See Thornhill v. Alabama, 310 U.S. 88 (1940). More important, petitioner believes that the right to assistance should be applied.

with equal vigor to state petitions, in view of the fact that a prisoner, in order to attack a conviction by federal habeas corpus, must "exhaust his state court remedies."

The state proceeding would become a stumbling block to federal relief if he cannot have assistance in the state petition, since he may not be able to prepare an intelligible petition, without assistance, sufficiently to raise the merits in the state court to "exhaust his state remedies." Moreover, since the state has made available habeas corpus proceedings (see Tenn. Code Ann. Section 23-1801 (1955)), a prison regulation which has the effect of making these procedures available only to literate or wealthy prisoners violates the equal protection clause of the Fourteenth Amendment. See Smith v. Bennett, 365 U.S. 708 (1961) (Filing fee for state habeas corpus petitions held invalid.)

A remaining question is whether a federal court should issue an order for petitioner's release from solitary confinement, when such an order may interfere with the internal administration of the prison. The Court of Appeals relied on the traditional reluctance of federal courts to review the internal administration of a prison. Nevertheless, that Court also found that the prison regulation was valid, so it was not faced with the dilemma of holding there was a federal right but no federal remedy. While federal courts have been generally reluctant to review decisions of prison management, this reluctance has not been without exception,

particularly when the prison practice in question jeopardizes access to federal courts by inmates. See, e.g., Dowd v. United States ex rel Cook, 340 U.S. 206 (1951); White v. Ragen, 324 U.S. 760 (1945); Cochran v. Kansas, 316 U.S. 255 (1942); Ex parte Hull, 312 U.S. 546 (1941). Also, in this case the court would not be supervising the regulation of internal prison affairs, since the only effect of a court order would be negative in character: it would prevent the enforcement of an invalid regulation. No affirmative duty would be imposed on prison officials by virtue of the writ.

Petitioner recognizes that problems of discipline and inmate morale might justify regulation of "jailhouse lawyers." One state has solved this difficulty by providing an alternative means of assistance to prisoners through a public defender program. See Ind. Stat. Ann. §§13-1401 to 13-1406 (1956). In New Jersey, prisoners may receive assistance from licensed attorneys in preparing petitions by virtue of a New Jersey Supreme Court rule. See Rossmore & Koenigsberg, Habeas Corpus and the Indigent Prisoner, 11 Rutgers L. Rev. 611 (1957). In any event, the District Court in this case was not unaware of disciplinary problems:

This is not to say that state prison authorities may not impose reasonable restraints upon the activities of so-called "jail-house lawyers," activities which doubtless cause many problems, including problems of prison discipline and morale. It may be, for example, that a regulation prohibiting the giving or receipt of compensation for such services, or restricting and regulating the time when they could be rendered, if accompanied by reasonable sanctions, would pass muster. Indeed, a regulation prohibiting the practice altogether might well be sustained if the state afforded to

prison inmates any reasonable alternative, such as an available list of qualified lawyers willing to volunteer their services, access to a public defender having statutory authority to represent them, or some other mode of ready and convenient contact with some qualified person capable of rendering them assistance in the preparation of their petitions or applications for habeas corpus relief. The present regulation, however, is absolute in its terms, it affords no alternatives, and it has the practical effect of silencing forever any constitutional claims which many prisoners might have. (Appendix B, infra, p. 14-15.)

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Karl P. Warden
Counsel for petitioner

CERTIFICATION OF SERVICE

I certify that I have, on this _____ day of November, 1967, mailed by first class mail, a copy of the foregoing Petition for a Writ of Certiorari to respondents' attorney of record, Henry C. Foutch, the Assistant Attorney General for the State of Tennessee, to his address at the Supreme Court Building, Nashville, Tennessee, air mail postage prepaid.

Karl P. Warden

APPENDIX A

28 U.S.C. § 2242 (1964)

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

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corpus petitions for other prisoners. Such solitary confinement is to continue until terminated on order of the Commissioner of Corrections.

This Court is aware of the extraordinary case load imposed upon the federal courts by the steadily increasing number of habeas corpus applications. In the past calendar year, this Court formally disposed of approximately 170 petitions, or nearly one formal disposition every 1½ work days. This number does not include the very substantial number of informal dispositions by letter or otherwise. Still, the prison regulation in question cannot be justified as an attempt to lessen the work load of the courts, for that is a problem which must be dealt with by the courts, and not by prison officials.

The present case presents a question of first impression and of undoubted importance. From the Court's experience with habeas corpus petitions, it is apparent that without the assistance of some third party, many prisoners in the state penitentiary would be totally incapable of preparing an intelligible petition, letter or request on their own behalf. The respondent does not deny this, but asserts that the solution is for such a prisoner to contact a licensed attorney to act in his behalf. Of course, the same incapacities (sub-standard intelligence, inability to write, etc.), which make it impossible for a prisoner to draft a meaningful habeas corpus petition also make it impossible for him to draft a letter which would be sufficient to arouse the attorney's interest. Furthermore, few indeed would be the lawyers who would volunteer to represent such prisoners, the great majority of whom are totally indigent.

For all practical purposes, if such prisoners cannot have the assistance of a "jail-house lawyer", their possibly

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In the
DISTRICT COURT OF THE UNITED STATES
For the Middle District of Tennessee
Nashville Division.

WILLIAM JOE JOHNSON,

Petitioner,

v.

HARRY S. AVERY, Commissioner
Department of Correction, and
C. MURRAY HENDERSON, War-
den, Tennessee State Penitentiary,
Nashville, Tennessee,
Respondents.

Civil No. 4170.

Memorandum.

This proceeding was begun as a motion for law books, a typewriter, and release from solitary confinement under 28 U. S. C. A., Sec. 1343 (3) and the 1964 Civil Rights Act. It is, in its essential aspects, a petition for a writ of habeas corpus, and it is so construed. The case comes on to be heard upon the petition and return, a hearing, and post-hearing briefs. It is not clear whether the petitioner has presented his claim of illegal confinement under maximum security to the state courts, but in any event under present state rulings the habeas corpus remedy in Tennessee would not be adequate to reach this question on its merits.

For the past eleven months, the petitioner has been kept in solitary confinement in the state penitentiary for the sole and admitted reason that he has violated a prison regulation which forbids prisoners from preparing habeas

verified". Certainly, if a prisoner is incapable of signing and verifying a petition, he is incapable of preparing one. The objection, in any event, would be insignificant since, in the future, the petitioner could actually sign and verify the petitions which he prepares.

Of course, the purpose of the statute is not to protect the petitioner, but to protect the constitutional rights of persons who are incapable of asserting their own rights. The situation, then, is this. Prisoners have a federal right to petition for a writ of habeas corpus. They have also a federal statutory right to have this remedy made effective by authorizing some third party to proceed in their behalf. Other prisoners have authorized the petitioner to do just that, and for his assistance the prison officials have placed him in solitary confinement for eleven months. Clearly, by the instant regulation, the prison officials have interfered with the statutory right of prisoners, incapable of acting for themselves, to have someone act on their behalf just as surely and effectively as if the officials had made it an offense for such prisoners to request such assistance. No matter how it is analyzed, the effect of the prison regulation now in question is to deprive these prisoners of their federal statutory right to have a habeas corpus petition filed on their behalf by a third party. This is not to say that state prison authorities may not impose reasonable restraints upon the activities of so-called "jail-house lawyers", activities which doubtless cause many problems, including problems of prison discipline and morale. It may be for example, that a regulation prohibiting the giving or receipt of compensation for such services, or restricting and regulating the time when they could be rendered if accompanied by reasonable sanctions, would pass muster. Indeed, a regulation prohibiting the practice altogether might well be sustained if the state afforded to prison inmates any reasonable alternative.

valid constitutional claims will never be heard in any court. At stake, then, is not only the claim of the instant petitioner, but more importantly, under the broad terms of the regulation, the practical denial to an indeterminate number of prisoners who are incapable of preparing their own requests or petitions of their day in court. Without some assistance, their right to habeas corpus in many instances becomes empty and meaningless. It is within this framework that we must examine the instant petition.

The common law and the courts have not been blind to similar problems. There are numerous cases which affirm the right of one party to petition for a writ of habeas corpus on behalf of a second party whenever it is shown first, that the petition is authorized by the second party, and second, that the second party is himself incapacitated or incapable of filing a petition. See, for example, *United States ex rel. Funaro v. Watchorn*, 164 F. 152 (S. D. N. Y., 1908), and *Collins v. Traeger*, 27 F. 2d 842 (9th Cir., 1928).¹ These cases prompted the revisers to amend 28 U. S. C. A., § 2242 so that it now reads:

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf. (Emphasis supplied to reflect amendment.)

By preparing petitions for other prisoners, the petitioner is certainly acting in their behalf. True, he does not actually sign or verify the petition, or himself submit it to the Court, but the statute may easily and justly be interpreted to include the lesser act of assistance in preparation of the petition within the meaning of "signed and

¹ See also, *Ex Parte Postal*, 243 F. 664 (N. D. Ohio, 1917); *United States ex rel. Bryant v. Houston* (2d Cir., 1921); *Nash v. MacArthur*, 184 F. 2d 606 (D. C. Cir., 1950); and *Wilson v. Dixon*, 256 F. 2d 636 (9th Cir., 1958) (one prisoner on behalf of another prisoner—denied for lack of authorization).

prison regulation in question raised solely questions of state law, or if there were not available alternatives to the present regulation. But, as we have seen, neither of these conditions exists in this case.

The final objection, that habeas corpus will not lie to challenge the petitioner's custody in solitary confinement, since he could not be released from total confinement, is answered by the well-reasoned and controlling case for this circuit, *Coffin v. Reichard*, 143 F. 2d 443 (6th Cir., 1944), in which the Court of Appeals ruled, in part, as follows:

A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits.

A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. . . . When a man possesses a substantial right, the courts will be diligent in finding a way to protect it. The fact that a person is legally in prison does not prevent the use of habeas corpus to protect his other inherent rights (p. 445).

See also, *Alexander v. Rundle*, 34 Law Week 2263 (Pa. Sup. Ct. 11/10/65); *Stevens v. Myers*, 34 Law Week 2189 (Pa. Sup. Ct., 9/29/65); and *Martin v. Commonwealth of Virginia*, 349 F. 2d 781 (4th Cir., 1965), in which the Court stated:

Ordinarily, a prisoner may resort to federal habeas corpus to make a collateral attack on federal consti-

such as an available list of qualified lawyers willing to volunteer their services, access to a public defender having statutory authority to represent them, or some other mode of ready and convenient contact with some qualified person capable of rendering them assistance in the preparation of their petitions or application for habeas corpus relief. The present regulation, however, is absolute in its terms, it affords no alternatives, and it has the practical effect of silencing forever any constitutional claims which many prisoners might have.

The question is whether this prison regulation, not directly authorized by state statute or state law, can be allowed to nullify a federal statute and, in turn, to suppress the assertion of a federal constitutional right. The question answers itself.

The only problems remaining are technical in nature and may be quickly disposed of. The complaining party in this proceeding is not a prisoner denied the assistance of petitioner in preparing an application for habeas corpus relief, and a question of standing is presented. The stated purpose of the petition is to secure petitioner's release from solitary confinement so that he may continue to assist other prisoners in the preparation of their habeas corpus petitions. Hence, the instant petition is at least indirectly filed on behalf of the other prisoners. Furthermore, it will be seen that if the petitioner cannot assert the rights of the other prisoners, the same incapacities which prevent them from asserting their constitutional rights will prevent them from asserting their statutory rights under Sec. 2242. The objection is circular, and cannot prevail. The respondent further objects to any action which this Court might take since it might disrupt the administration and internal workings of the prison. Of course, that objection might be well founded if the

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ful restraints upon their liberty." Several states already adopted this view, expanding in recent years the concept of habeas corpus to permit a prisoner to litigate his right to liberty at a future date.

Furthermore, it should be noted that the relief sought in the present case is, in fact, to release the petitioner from custody—from the very real custody of solitary confinement which is, in a sense, a jail within a jail. Thus, even if the Supreme Court were to follow *McNally v. Hill* today, the holding in that case would not prevent habeas corpus relief under the facts of the present case. Under the ruling in *Goffin v. Reichard, supra*, even though the petitioner is lawfully confined in the penitentiary, he has a right not to have confinement made more burdensome by being placed for an indefinite period in solitary confinement solely for violating a prison regulation which the Court now holds to be in direct conflict with 28 U. S. C. A. § 2242 and, therefore, void. Absent such regulation, there is no justification for the petitioner's custody in solitary confinement. His confinement, therefore, is arbitrary and capricious, and a violation of his rights under the Fourteenth Amendment.

There is also before the Court a motion to require the respondents to furnish the petitioner with good and whole-some food. In light of the disposition of his habeas corpus petition, no decision will be necessary on this motion. No consideration need be given to petitioner's request that he be furnished with a typewriter, since that request has now been withdrawn. Finally, petitioner has requested the Court to furnish him with various legal materials and Supreme Court reports. The Court agrees with the respondent that the state is not required to furnish these materials and reports to the petitioner. See, for example, *Barber v. Page*, 239 F. Supp. 265 (E. D. Okla., 1965).

tutional grounds upon his state court conviction. The federal habeas corpus statute, 28 U. S. C. A., § 2241 (1959), makes the writ available for this purpose if the prisoner is "in custody in violation of the Constitution . . . of the United States. . . ." Over thirty years ago, the Supreme Court held that a sentence which the prisoner had not begun to serve did not satisfy the statutory requirement of "custody" even though a result of the challenged sentence was to thwart his eligibility for parole. *McNally v. Hill*, 293 U. S. 131, 55 S. Ct. 24, 79 L. Ed. 238 (1934). If this decision stood alone, unqualified by later decisions of the Supreme Court, we as a lower court would be bound to follow it. Since then, however, the Court has relaxed the strictness of this interpretation and held that one on parole is in "custody" within the meaning of the term as used in 28 U. S. C. A., § 2241. *Jones v. Cunningham*, 371 U. S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963). Still later, the Court in broad terms, equated "custody" with "restraint of liberty." *Fay v. Noia*, 372 U. S. 391, 427, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

In light of these progressively developing notions as to the scope of the writ of habeas corpus, there is reasonable ground for thinking that were the Supreme Court faced with the issue today, it might well reconsider *McNally* and hold that a denial of eligibility for parole is a "restraint of liberty" no less substantial than the technical restraint of parole. Indeed, in *Jones v. Cunningham*, 371 U. S. 236, 243, 83 S. Ct. 373, 377, the Court said: "[Habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrong-

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Furthermore, the Court notes that habeas corpus petitions need not, and indeed should not, contain extensive legal citations. All that is required is a short, simple and intelligible statement of the facts upon which this petitioner bases his claim for relief. Consequently, petitioner's request for legal materials and reports is hereby denied. For the reasons stated above, however, the Court holds that the petitioner should be released from solitary confinement and restored to his status as an ordinary prisoner. An order will be submitted accordingly.

/s/ WM. E. MILLER,

United States District Judge.

Attest: A True Copy.

BRANDON LEWIS, Clerk,

U. S. District Court,

Middle District of Tennessee,

By: L. M. EDWARDS, D. C.

(Seal)

FILED

AUG 31 1967

CARL W. REUSS, Clerk

No. 17292

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

WILLIAM JOE JOHNSON,
Petitioner-Appellee,
v.

HARRY S. AVERY, Commissioner of
Correction, and
C. MURRAY HENDERSON, Warden,
Tennessee State Penitentiary,
Respondents-Appellants.

APPEAL from United
States District Court,
Middle District of
Tennessee, Nashville
Division.

Decided August 31, 1967.

Before WEICK, Chief Judge, PECK, Circuit Judge, and CECIL,
Senior Circuit Judge.

WEICK, Chief Judge. The crux of this case is the question of validity of a regulation of the Tennessee State Penitentiary at Nashville, which prohibits any inmate from advising or assisting other prisoners in the preparation or filing of writs of habeas corpus or other legal papers.¹ The regulation was promulgated and enforced by the defendants-appellants in

¹ Guidance Manual for Prisoners, Sec. VI, page 7:

"No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters. It is not intended that an innocent man be punished. When a man believes he is unlawfully held or illegally convicted, he should prepare a brief or state his complaint in letter form and address it to his lawyer or a judge. A formal Writ is not necessary to receive a hearing. False charges or untrue complaints may be punished. Inmates are forbidden to set themselves up as practitioners for the purpose of promoting a business of writing Writs."

The perspective through which we view this question, even though it seems one of first impression, must be framed by the well-established reluctance of the Federal Courts to intervene in internal affairs of state or Federal penal institutions. Regulations for the administration and discipline of prisons, promulgated and enforced by duly authorized officials, are not subject to review by the courts unless it can be clearly demonstrated that they interfere with fundamental rights guaranteed by the Constitution. *United States v. Marchese*, 341 F.2d 782 (9th Cir. 1965) *cert. denied* 382 U.S. 817 (1965); *McCloskey v. Maryland*, 337 F.2d 72 (4th Cir. 1964); *Kirby v. Thomas*, 336 F.2d 462 (6th Cir. 1964); *Sostre v. McCinnis*, 334 F.2d 906 (2nd Cir. 1964) *cert. denied* 379 U.S. 892 (1964); *Childs v. Fegelow*, 321 F.2d 487 (4th Cir. 1963) *cert. denied* 376 U.S. 932 (1964); *Hatfield v. Baillieux*, 290 F.2d 632 (9th Cir. 1961) *cert. denied* 368 U.S. 862 (1961); *Stiegel v. Hagen*, 180 F.2d 785 (7th Cir. 1950) *cert. denied* 339 U.S. 990 (1950). This proposition is soundly based on the fact that prison administration is a function of the executive branch of the Government and one for which the courts, with their limited experience and facilities, are ill-suited to undertake. Further, in this case the imperatives of our Federal system require special concern for the boundaries of state and Federal governmental competence as allocated by our basic charter. An important additional consideration here is the undisputed right of individual states to specify the qualifications for entrance to their respective bars and to regulate the practice of law within their borders. *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961); *In re Lockwood*, 154 U.S. 116 (1894); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872); *Emmons v. Smith*, 149 F.2d 869 (6th Cir. 1945) *cert. denied* 326 U.S. 746 (1945); *Niklaus v. Simmons*, 196 F. Supp. 691 (D. Neb. 1961). See also *Theard v. United States*, 354 U.S. 278 (1957); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). While the interests of the states are sometimes deemed less

their official capacities as Commissioner of Correction of the State of Tennessee and Warden of the State Penitentiary, respectively.

After being subjected to punishment for repeated violations of the rule, usually by confinement in the "maximum security building" of the prison, petitioner filed a "motion for law books and a typewriter", which the District Court treated as an application for a writ of habeas corpus, and granted. The prison authorities appealed.

The District Court reasoned that because the words of the habeas corpus statute, 28 U.S.C. § 2242, authorized the filing of an application for a writ of habeas corpus "signed and verified by the person for whose relief it is intended or by someone acting in his behalf" (emphasis added), the prison regulation conflicted with the Federal law. The District Court further held that unless petitioner could continue to serve as a "writ writer" or "jailhouse lawyer" for his fellow inmates, their constitutional rights to the effective aid of habeas corpus would be endangered since "without the assistance of some third party, many prisoners in the state penitentiary would be totally incapable of preparing an intelligible petition, letter, or request." We must disagree with both of these conclusions.

At the outset, we agree with the holding of the District Court that petitioner has standing to question the validity of the regulation. While defendants urge that petitioner himself has never been denied the right to file petitions on his own behalf in Federal or state courts, it seems clear that he has been subjected to a restraint upon his liberties unauthorized by the life sentence he is serving. In such a case, habeas corpus will lie to inquire into the lawfulness of this added punishment, even though it will not result in his unconditional release from prison. *Martin v. Commonwealth of Virginia*, 349 F.2d 781 (4th Cir. 1965); *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944) cert. denied 325 U.S. 887 (1945).

was that petitioner's services are needed to make other prisoners' rights to habeas corpus effective in light of their own limited abilities. We believe that on closer analysis this right to effective post-conviction procedures does not warrant so drastic a limitation on the power of the state to regulate discipline in its penal institutions and to control the practice of law within its borders.

While we agree that representation by counsel may be a significant part of the post-conviction remedy, it is important to recognize that the Supreme Court has not yet held that it is an indispensable element of due process under the Constitution. Several circuits have stated the advisability of appointing counsel. *Taylor v. Pegelow*, 335 F.2d 147 (4th Cir. 1964); *Dillon v. United States*, 307 F.2d 445 (9th Cir. 1962); *United States v. Wilkins*, 281 F.2d 707 (2d Cir. 1960). However, it is not required in every such case, *Barker v. Ohio*, 330 F.2d 594 (6th Cir. 1964). In any event, the Federal Courts have power to appoint counsel for indigents in proceedings before them to assure the protection of the indigents' rights. 28 U.S.C. § 1915(d).

The same concern for effectuating basic Constitutional rights through representation by counsel, which motivated the District Court in this case, is evidenced in recent cases in which the Supreme Court has defined the need for counsel in "critical" pre-trial stages, *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Wade*, — U.S. — (1967), as well as at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Yet in none of those cases did the Court indicate that these rights could be protected through representation by a layman. To the contrary, the Court has consistently emphasized that it is representation by trained counsel which is necessary to take advantage of the full scope of an accused's rights and shield him from unfair tactics or his own ignorance. We agree with this approach to the problem of effectuating Constitutional rights both as to pre-trial events and post-con-

significant than those provisions of the Constitution upon which they may impinge, see *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), *NAACP v. Button*, 371 U.S. 415 (1963), *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957), *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), it is interesting to note that in all cases where the state's regulatory power was limited in deference to Constitutional standards, the practitioners involved were all concededly qualified to practice law by previous academic training. In no case has the Constitution been read to grant an untrained and unlicensed person the right to practice law.

The State of Tennessee has enacted a series of statutes governing qualification and admission to the practice of law, T.C.A. §§ 29-101-110; the rights and duties of attorneys, T.C.A. §§ 29-201-204; and unauthorized practice and improper conduct, T.C.A. §§ 29-301-312. These sections include provisions for court assignment of counsel for paupers, permission for any party to conduct his own case, prohibitions upon the unlawful practice of law, and penalties for falsely representing oneself as an attorney. Petitioner does not allege that he has complied with any of these laws, despite the fact that his activities clearly constitute unlawful practice in Tennessee. In essence, then, the ruling of the District Court allows petitioner to engage in activity in the state prison which would constitute a crime if conducted outside the penitentiary. (There seems to be little question that petitioner, a convicted felon, could ever obtain a license to practice in state or Federal Courts even if he had the required legal education, which he does not have.)

The main thrust of the District Court's opinion on this issue

2 T.C.A. § 29-302 defines the practice of law in Tennessee as follows: "The practice of law is defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents, or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies."

viction proceedings. Indeed, we believe that no favor is granted to the other prisoners by allowing them representation by one untrained in the complexities of post-conviction procedure and unrestrained by the values, ethics, and traditions of the bar. It takes little imagination to recognize possibilities of conflict of interest in allowing one who is a convicted murderer, rapist or burglar, serving a long sentence, to represent prisoners who have possible meritorious claims.

We do not agree with the District Court that "[b]y preparing petitions for other prisoners, the petitioner is certainly acting in their behalf." Neither the language nor the policy of 28 U.S.C. § 2242 justifies such a conclusion.

The provision of the law authorizing someone to act on behalf of a prisoner whose release is sought, relates only to the act of signing or verifying the petition, and we do not interpret that authorization to include the preparing of legal papers and serving as an attorney in violation of state law. In addition, the inability or incompetency to which this section is addressed is not the inability to draft legal papers as the District Court seems to hold. Most laymen lack that ability and it would hardly be necessary to include a special provision of law to authorize the employment of trained legal assistance in preparing papers. It seems clear that the situation to which this provision was meant to apply, is one where physical or mental handicaps prevent the prisoner from personally signing or verifying the petition, not one wherein lack of intelligence or legal training keep him from drafting his own papers. See *United States v. Houston*, 273 Fed. 915 (2d Cir. 1921).

The problem of providing effective access to legal assistance at all stages of criminal justice, from pre-trial to post-conviction, certainly deserves the concern which the District Court showed in this case. However, its solution is more likely to be assured if it is attended to by the bench, bar, and law schools rather than left to the *ad hoc* procedures sanctioned in the District Court.

Reversed.

STATE OF TENNESSEE EX REL
JAMES E. DAWSON

V.

C. MURRAY HENDERSON, WARDEN,
TENNESSEE STATE PENITENTIARY

For Plaintiff in Error:

John J. Archer
Nashville, Tennessee

For the State:

Paul E. Jennings
Assistant Attorney General

O P I N I O N

This is another of the many, many petitions for the writ of habeas corpus such as we have had in recent years. The main contention here is whether or not the trial court erred in failing to grant the petitioner an evidentiary hearing on allegations set forth in his petition. The allegations are the usual twelve contentions presented in these many petitions.

Dawson was convicted on May 11, 1965, for the offense of robbery with a deadly weapon and was sentenced to twenty-five (25) years in the penitentiary. He is now in the State penitentiary. His petition was thus prepared by the writ-writer in the penitentiary and filed in the Circuit Court of Davidson County and was transferred pursuant to statute by the Chief Justice to one of the Criminal Courts of that county.

The petitioner alleges that: (1) the trial court was without authority to indict, try, convict and sentence him because the Legislature which defined the offense was malappor-
tioned; (2) he was arrested without a warrant; (3) he was not furnished a copy of the warrant which was sworn against him; (4) he was not represented by counsel at his preliminary hearing; (5) he was not furnished a copy of the panel of grand jurors; (6) he was not furnished a copy of the panel of the petit jurors; (7) he was indicted, tried and convicted by juries composed solely of white persons in violation of his constitutional rights and was not informed of his right to have Negroes on his jury; (8) he was tried and convicted by a jury which was improperly selected in that the names of the petit jurors were not picked from a jury box by a blindfolded person; (9) he was not furnished a copy of the statement of one of his co-defendants, said statement allegedly implicating him; (10) there is no evidence to support the verdict of the jury; (11) there was no corpus delicti established; and (12) the sentence imposed was so excessive as to show prejudice, passion and caprice on the part of the trial jury and said sentence constitutes cruel and unusual punishment against the petitioner.

As said in the outset hereof the Criminal Judge denied this petition without an evidentiary hearing and made a written finding and statement of why he did so. This statement,

or Order of the Criminal Judge, does not directly controvert or dispose of the allegations of the petitioner, and the denial of the hearing on these matters and refusal to appoint counsel effectively precluded petitioner from introducing evidence to prove their truth. These statements of the Criminal Judge are statements made of his own knowledge, but as far as this record is concerned are not supported by evidence, and it is necessary in a number of the issues that said statements which are known to the trial judge be supported by evidence to meet certain of the requirements of a number of Federal cases. Therefore, it seems to us that at least on one of the issues alleged by the petitioner, hereinafter pointed out, that it is necessary that this case be remanded for an evidentiary hearing.

The allegations of this petitioner, 1, 2, 3, 5, 6 and 8 were dealt with by this Court in the opinion of State ex rel Callahan v. Henderson, ___ S.W.2d ___, released for publication on July 28, 1967.

Allegation number (4) that the petitioner was not represented by counsel at his preliminary hearing, has frequently been dealt with by this Court, and we have held that such proceedings are not critical in this State when the petitioner does not act to his prejudice, such as entering a plea of guilty. State ex rel Carlson v. State, ___ Tenn. ___, 407 S.W.2d 165, 169.

Petitioner's allegation number (7) alleges that Negroes were systematically excluded from his juries. There is no evidence in this record other than this allegation and the statement by the trial judge that this is without merit "since the Court knows and finds that both the grand jury and petit jury had, both before, at the time, and since his trial contained the names of Negroes as well as white people." This statement though alone, without showing how this was done by an evidentiary hearing and giving this petitioner a chance to show these things, is not sufficient. A defendant is not constitutionally entitled to demand a proportionate number of his race on the jury. State ex rel Smith v. Johnson, ___ Tenn. ___, 413 S.W.2d 694; Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759. The allegations in this petition merely allege that no Negroes were included on the juries and this fact is contradicted by the statement of the trial judge who knows what was done in this particular case and was done in other similar cases in his court. We think though the statement of the trial judge is insufficient with regard to this allegation, and consequently under the authority of Reed v. Heer, ___ Tenn. ___, 403 S.W.2d 310, this cause must be remanded for an evidentiary hearing.

The ninth allegation was to the effect that the petitioner had not been furnished a copy of the statement of his co-defendant which implicated the petitioner. The record shows

that the petitioner entered a plea of guilty to the offense and further does not allege that the statement was introduced against him. It is therefore our finding under such allegations, as it was by the trial judge, that the petitioner suffered no prejudice in this regard.

The petitioner's allegations numbers (10) and (11) contending there was an insufficiency of evidence to convict him is not a matter which is reversible by a writ of habeas corpus. Fernandez v. Klinger, 346 F.2d 210, certiorari denied 382 U.S. 152.

The allegations contained in number (12) certainly cannot be raised in a petition of this kind because the punishment as meted out by the jury does not show that it is anything unusual and it is well within the statute for such crime, and such punishment cannot be attacked as cruel and unusual. See Hardin v. State 210 Tenn. 116, 355 S.W.2d 105, where this Court held that the provisions of Article I, Section 16 of the Constitution of the State of Tennessee are not violated as long as the punishment is within the statutory provisions. The Federal Courts apply this rule. Harris v. Stephens, 361 F.2d 888.

Because we think there should be an evidentiary hearing on the question of the exclusion as above set forth,

the cause is remanded to the Criminal Court of Davidson County for that purpose with the request that Mr. Archer, who represented the petitioner herein by appointment, remain as his counsel. We extend our appreciation to Mr. Archer for what he has done and what he will do in the future, and he can get compensation by filing a petition with the Executive Secretary for the Supreme Court.

Per Curiam.

Thurmond P. Rind

Office of CLERK OF THE SUPREME COURT
FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, **RAMSEY LEATHERS**, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the **OPINION** of said Court, pronounced at its December term, 19 66, in case of STATE, EX REL. **JAMES E. DAWSON** against **C. MURRAY HENDERSON, WARDEN, ETC.** as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 31st day of October, 19 67

Ramsey Leathers Clerk
By _____ Deputy Clerk

IN THE FIFTH CIRCUIT COURT
OF DAVIDSON COUNTY, TENNESSEE

FILED

FEB 8 1967

ARMED ROBBERY

FILED

DEC 7 1963

ALF. RUTHERFORD, Clerk

MOTION TO INVALIDATE THE CONVICTION AND
JUDGMENT OF TWENTY-FIVE (25) YEARS IN THE
TENNESSEE STATE PENITENTIARY, AT NASHVILLE,
TENNESSEE, FOR THE CRIME OF ARMED ROBBERY,
ON BEHALF OF THE DEFENDANT, JAMES DAWSON.

A-1649

TO THE HONORABLE SAM L. FELTS, JR., PRESIDING JUDGE OF THE FIFTH CIRCUIT
COURT OF DAVIDSON COUNTY, TENNESSEE:

MAY IT PLEASE THE HONORABLE COURT:

Comes now, the defendant, James Dawson, in his own proper person, in
the above styled cause, and hereby respectfully moves the Honorable Court
to invalidate the conviction, and judgment of twenty-five (25) years in the
Tennessee State Penitentiary, at Nashville, Tennessee, for the crime of Arm-
ed Robbery, which were imposed against him illegally and unlawfully by the
Division Two, Criminal Court of Davidson County, Tennessee, in May, 1965,
despite his plead of not guilty before a trial jury, along with two (2) co-
defendants thereof, on the following grounds:

I

Because the Division Two, Criminal Court of Davidson County, Tennessee,
was without jurisdiction to indict, try, convict, and sentence the defendant
to the term of twenty-five (25) years in the Tennessee State Penitentiary,
at Nashville, Tennessee, for the crime of armed robbery, because the Statute
(Tennessee Code Annotated, Section 39-3901) which describing the offense,
and punishment for the said crime of Armed Robbery, is invalid, unconstitu-
tional, and on post facto, because the legislatures which enacted and re-
enacted it were improperly apportioned in violation of the Fourteenth Amend-
ment to the Constitution of the United States, as a result of Tennessee's
failure to adequately reapportion the legislative seats, and districts of
the State of Tennessee since 1901, although required to do so, every ten (10)
under Article II, Sections 4, 5, and 6 of the Constitution of the State of
the State of Tennessee, so as to continually to provide equal representation

every citizen of the State of Tennessee. (See the Reappor-
of Baker V. Carr, 179 F. Supp. 824 (1959) cert. Granted, 364
(1960), 179 F. Supp. 828; Baker V. Carr, 364 U.S. 889; Baker V.
366 U.S. 907; Baker V. Carr, 369 U.S. 186 (1962). 200.)

II

Because the defendant was arrested at his home in Mount Pleasant, Tenn-
essee, on February, 22, 1965, by officers thereof, without a warrant author-
izing them to do so, in violations of Tennessee law, Article I, Declaration
of Rights, Sections 7 and 8 of the Constitution of the State of Tennessee,
and the Fourth and Fourteenth Amendments to the Constitution of the United
States, taken to the city hall in said Mount Pleasant, Tennessee, interro-
gated, and thereafter, taken to the Davidson County Jail, in Nashville,
Tennessee, where he was again, interrogated, and therewith, charged with
the crime of armed robbery, despite his denial of it thereof.

III

Because the defendant was not furnished a copy of the warrant that was
sworn out against him by his accuser, and therewith, issued by the General
Sessions Judge of the General Sessions Court of Davidson County, at Nash-
ville, Tennessee, charging him therein, with the crime of armed robbery, as
required under Tennessee law, for the preparation and filing of a defense
thereto, or advised by anyone as to his rights to be furnished a copy of
the said warrant of armed robbery, although he was ignorant of law, and did
not know that he was entitled to be furnished a copy of the said warrant of
armed robbery.

IV

Because the defendant was not represented by a lawyer at his preliminary
hearing in the General Sessions Court of Davidson County, at Nashville, Tenn-
essee, in respect to the charge of armed robbery, as required in all crimi-
nal proceedings under the provisions of Tennessee Code Annotated, Sections
40-2001 - 40-2002 - 40-2003, Article I, Declaration of Rights, Section 9 of
the Constitution of the State of Tennessee and the Sixth, and Fourteenth A-
mendments to the Constitution of the United States, for the preparation and
filing of a defense thereto or advised by the General Sessions Judge thereof
, as to his rights to be represented by a lawyer appointed by the court, or
employed by his own means at the said preliminary hearing, although the de-
fendant was poor, ignorant of law, did not know that he was entitled to
be represented by a lawyer, did not know how to challenge the legality of
the charge set forth in the warrant, or prepare and file a defense thereto,

to challenge the legality of the state evidence to deter-
mine whether or not it was good or bad, pleaded not guilty to the
charge and was therewith, bound over to the State for the action of
the Grand Jury. The defendant stated, Your Honor, that his said preliminary
hearing in the said General Sessions Court of Davidson County, at Nashville,
Tennessee, was a critical stage of the proceedings against him, and there-
fore, he certainly needed the assistance of a lawyer, because what happened
to him thereof, affected his whole preliminary hearing, indictment, and
trial proceedings, and thereby, resulted into his conviction, and judgment
of twenty-five (25) years in the Tennessee State Penitentiary, at Nashville,
Tennessee, for the said crime of armed robbery.

V

Because the defendant was not furnished a copy of the panel of Grand
Jury before his trial proceedings, in the Division Two, Criminal Court of
Davidson County, Tennessee, as required in all criminal cases under Tennes-
see law, for the preparation and filing of a plea in abatement to the in-
dictment for incompetency of Grand Jurors, or advised by anyone as to his
right to be furnished a copy of the said panel of Grand Jury, although he
was ignorant of law, accused of committing a serious crime, and did not
know that he was entitled to be furnished a copy of the said panel of Grand
jury.

The defendant is entitled to a copy of the panel of Grand Jury, so
that he may file a plea in abatement to the indictment for incompetency of
Grand Jurors. Bennett v. State (1827), 8 Tenn. 133.

VI

Because the defendant was not furnished a list of the petit jurors that
were summoned to hear and determine his case of armed robbery before his
trial proceedings in the Division Two, Criminal Court of Davidson County,
Tennessee, as required in all criminal cases under Tennessee Code Annotated
, Section 40-2505, or advised by anyone as to his rights to be furnished a
list of the said Petit Jurors, although he was ignorant of law, accused of
committing a serious crime, and did not know that he was entitled to be fur-
nished a list of the said Petit Jurors.

A prisoner standing mute is entitled to the Panel or list of jurors
summoned. Link v. State (1871), 50 Tenn. 252.

VII

Because the defendant was indicted, tried, and convicted by a jury com-
posed solely of white persons in direct violation of the due process and

...ion clauses of Article I, Declaration of Rights, Section 8 of
...tion of the State of Tennessee, and the Fourteenth Amendment to
...stitution of the United States, because no negroes were selected to
...thereof, although he was a Negro, accused of committing a capital case,
...the victim in the case was a white person. Moreover, Your Honor, the
...defendant was not advised by the trial court, of his counsel as to his rights
...to have Negroes as well as white persons to serve on the Grand and Petit Ju-
...ries of his case of armed robbery, and if he had been advised of his con-
...stitutional rights to have Negroes and white persons to serve on the said
...Grand and Petit Juries, he certainly would have requested the trial court,
...and his counsel to do so.

Your Honor, congress has expressly forbidden the exclusion of any citi-
zen from service as a grand or petit juror in any state court, on the ground
of race or color, Sec. 5, 14th Amendment, 18 Statutes 336 Title 8, U.S.C.A.,
Sec. 44.

In 1860, the Supreme Court of the United States, in *Strauder v. West Virginia*, 100 U.S. 303, one of the first cases applying the Fourteenth Amend-
ment to racial discrimination, held that under the equal protection clause,
a state cannot systematically exclude persons from juries solely because of
their race or color. Since *Strauder* and until today the said Supreme Court
of the United States, has consistently applied this constitutional principle.
See *Ex parte Virginia*, 100 U.S. 339; *Neal v. Delaware*, 103 U.S. 370; *Gibson v. Mississippi*, 162 U.S. 565; *Carter v. Texas*, 177 U.S. 442; *Rogers v. Alabama*, 192 U.S. 226; *Martin v. Texas*, 200 U.S. 316; *Norris v. Alabama*, 294 U.S. 587; *Hale v. Kentucky*, 303 U.S. 613; *Pierre v. Louisiana*, 306 U.S. 354; *Smith v. Texas*, 311 U.S. 128; *Hill v. Texas*, 316 U.S. 400; *Akins v. Texas*, 325 U.S. 398; *Patton v. Mississippi*, 332 U.S. 463; *Cassell v. Texas*, 339 U.S. 282; *Hernandez v. Texas*, 347 U.S. 475; *Reece v. Georgia*, 350 U.S. 85; *Eubanks v. Louisiana*, 356 U.S. 585; *Arnold v. North Carolina*, 376 U.S. 773.

The rationale upon which these decisions rest was clearly stated in
Norris v. Alabama, *Supra*, at 589:

"There is no controversy as to the constitutional principle involved, .
...., summing up precisely the effect of earlier decisions, the Supreme Court
thus stated the principle in *Carter v. Texas*, 177 U.S. 442, 447, in rela-
tion to exclusion from service on grand juries: "Whenever by any action of
a state, whether through its legislature, through its courts, or through its
executive or administrative officers, all persons of the African race are ex-
cluded, solely because of their race or color, from serving as grand jurors

is denied to him, contrary to the Fourteenth Amendment of the United States. *Strader v. West Virginia*, 100 U.S. 370, 397; *Gibson v. Mississippi*, 162 U.S. 226, 231, and again in *Martin v. Texas*, 200 U.S. 316, 319. This principle is equally applicable to a similar exclusion of Negroes from office on petit juries. *Strader v. West Virginia*, *Supra*, *Martin v. Texas*, *Supra*. And although the State Statute defining the qualification of jurors may be fair on its face the constitutional provisions affords protection against action of the state through its administrative officers in effecting the prohibited discrimination. *Neal v. Delaware*, *Supra*; *Carter v. Texas*, *Supra*. Compare *Virginia v. Rives*, 100 U.S. 313, 322, 323; *In re Wood*, 140 U.S. 278, 285; *Thomas v. Texas*, 212 U.S. 278, 282, 283.

This set of principles was recently and explicitly reaffirmed by the said Supreme Court of the United States, in *Eubanks v. Louisiana*, *Supra*, and *Arnold v. North Carolina*, *Supra*.

The reasons underlying the court's decisions in these cases were well expressed in *Strader*:

"The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his commentaries, says, 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the great bulwark of his liberties, and is secured to him by the Great Charter. It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called packing juries. It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.'" 100 U.S., at 308-309.

Moreover, (1) the very fact that colored people are singled out and expressly denied (by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and maybe in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the

equal justice which the law aims to secure to all others. 100.

principles and reasoning upon which this long line of decisions are sound. The need for their reaffirmation is present. The United Commission of Civil Rights in its 1961 report, Justice, 103, after extensive study of the practice of discrimination in jury selection, concluded that (t) he practice of racial exclusion from juries persists today even though it has long stood indicted as a serious violation of the Fourteenth Amendment. "It is unthinkable, therefore, that the principles of Stroudor and the cases following should be in any way weakened or undermined at this late date particularly when the Supreme Court of the United States has made it clear in other areas, where the course of decision has not been so infirm, that the States may not discriminate on the basis of race. Compare Plessy V. Ferguson, 163 U.S. 537, with Brown V. Board of Education, 347 U.S. 483; Compco V. Alabama, 106 U.S. 583, with McLaughlin V. Florida, 309 U.S. _____.

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. Yick Wo VS. Hopkins, 118 U.S. 356, (1885).

VIII

Because the defendant was tried, and convicted by a trial jury which itself was illegally and unlawfully constituted in direct violations of his constitutional rights to a fair and impartial trial by an impartial jury of his peers, as guaranteed to him under the provisions of Article I, Declaration of rights, Sections 8 and 9 of the Constitution of the State of Tennessee, and the Sixth, and Fourteenth Amendments to the Constitution of the United States, because the names of the petit jurors were not picked from a jury-box or other receptacle by a blindfolded person, as required in all criminal cases under Tennessee. For a full review, and discussion on the issue of the selections of juries, see Text Books, History of a lawsuit (7th ed., Gilreath), 739; 31 Am. Jur., Jury, 60; 50 C.J.S., Juries, 182.

A party may raise for the first time, after trial, any irregularity in the selection of a jury, if knowledge thereof, becomes known to him after trial. McCormack V. McMahon, Mo1, 274 S.W. 2d 272, 10 C. Cit. 275 (4,5); ---Sho-Ko Power Corp. V. Fann, 292 S.W. 2d 91.

IX

the defendant was not furnished a copy of the statement of One co-defendant's, implicating the defendant in the crime of armed robbery, before his trial proceedings in the Division Two, criminal Court of Davidson County, Tennessee, for the challenging of the legality of it hereof, as required in all criminal cases under T.C.A., Section 40-2b41. Moreover, he was not present at the time the said statement was given to the officers of the Nashville Police Department, by his said co-defendant, implicating the defendant in the crime of armed robbery.

X

Because there was no competent evidence to support the verdict of guilty returned by the trial jury against the defendant for the crime of armed robbery, whereas, the only evidence that connected the defendant with the crime of armed robbery was a null and void statement of one (1) of his co-defendants. (See the court reporter's Transcript of the defendant's proceedings)

XI

Because there was no corpus delicti. (See the court reporter's Transcript of the defendant's trial proceedings of armed robbery in the office of the Clerk of the Criminal Courts of Davidson County, Tennessee.)

XII

Because the sentence of twenty-five (25) years imprisonment imposed by the verdict of the trial jury against the defendant, for the crime of armed robbery in the Division Two, Criminal Court of Davidson County, Tennessee, was so excessive as to show prejudice passion, and caprice upon the part of the said trial jury. Moreover, the said sentence of twenty-five (25) years imprisonment imposed by the verdict of the said trial jury, for the said crime of armed robbery, constitutes cruel and unusual punishment upon the defendant in direct violation of Article I, Declaration of Rights, section 16 of the Constitution of the State of Tennessee, and the Eight Amendment to the Constitution of the United States, because it (the sentence of twenty-five (25) years imprisonment) has no parole date under Tennessee law, and the State of Tennessee, Division of pardons, paroles & probation.

The defendant avers, Your Honor, that as a result of the above said illegal process, as complained hereof, he has been denied, and deprived of his liberty without due process and equal protection of laws in direct violation of Article I, Declaration of Rights, Section 8 of the Constitution of the

Tennessee, and the Fifth, and Fourteenth Amendments to the Constitution of the United States, and therefore, he is duly entitled to an annulment of his conviction, and judgment of twenty-five (25) years in the Tennessee State Penitentiary, at Nashville, Tennessee, for the crime of armed robbery, by a court of law, as a matter of due process of law.

State Courts, equally with Federal Courts, are under an obligation to guard and enforce every right secured by the Federal Constitution, Constitution of the United States, Article VI, Clause 2; *Smith V. O'Grady, Supra*; *Palmer V. Ashe, 324 U.S. 135*.

The Supreme Court of the United States is the final arbiter of questions involving the contract, retrospective law, due process and equal protection provisions contained in both the state and Federal Constitutions so that all decisions of such court with reference to such questions are controlling. *Paine V. Fox (1938), 172 Tenn. 290, 112 S.W. (2d) 1*; *Martin V. Hunter's Lessee, 1 Wheat. 304, 4 L. Ed. 97 (1816)*.

The defendant further avers, Your Honor, that the legality of his detention and restraint has not been determined by a court of the State of Tennessee, on a previously motion to invalidate the conviction, and judgment in his case of armed robbery, upon the allegations set forth in his said motion hereof, and this is the first application for a motion to invalidate the conviction, and judgment of armed robbery, that's ever been filed by the defendant in a court of the State of Tennessee, upon the allegations set forth hereof, although a previously petition for writ of habeas corpus was denied by the Division Two, Criminal Court of Davidson County, Tennessee, in 1966, but no appeal was prosecuted to the State Supreme Court, due to the fact that the said petition for writ of habeas corpus, was not adequately prepared, and premature. Moreover, the defendant avers, Your Honor, that he was unable to attach to this motion hereof, as exhibits thereto, the certified copy of the arrest warrant, the certified copy of the minutes of the preliminary hearing, the certified copy of the indictment, the certified copy of the verdict-judgment, and the certified copy of the court reporter's transcript of the trial proceedings of armed robbery, which were had in the Division Two, Criminal Court of Davidson County, Tennessee, and the certified copy of the previously petition for writ of habeas corpus, because he was unable to pay the Clerk of the Criminal Court of Davidson County, Tennessee, the necessary fee for the said records of his case, due to his poverty, and confinement in the Tennessee State Penitentiary, at Nashville, Tennessee, and

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erely believes, that he is entitled to prosecute his motion hereof, matter of due process of law. Therefore, Your Honor, this said Honorable Court hereof, should as fairpass on behalf of the defendant's case, take judicial notice of the person of the defendant, the subject matter, and therewith, grant him the relief sought, as a matter of due process of law.

PREMISES CONSIDERED, YOUR HONOR, the defendant, James Dawson, respectfully prays the Honorable Court:

I

To invalidate the conviction, and judgment of twenty-five (25) years in the Tennessee State Penitentiary at Nashville, Tennessee, for the crime of armed robbery, in the above styled cause, and therewith, order the Warden of the Tennessee State Penitentiary, at Nashville, Tennessee, to release the defendant from custody thereof, as a matter of due process of law.

II

To appoint the Honorable Robert L. Jackson, and the Honorable John C. Tune, Jr., of the Tennessee Bar Association, to make a thoroughly investigation of the defendant's case, prepare, and file a memorandum, or an amended motion in further support of the defendant's motion hereof, and therewith, represent the defendant before the Bar of this Honorable Court, without cost to him, due to his poverty, and confinement in the Tennessee State Penitentiary, at Nashville, Tennessee, as a matter of due process of law.

III

To subpoena the arresting officers in the defendant's case; the victim in the defendant's case of armed robbery, the General Sessions Judge of the General Sessions Court of Davidson County, at Nashville, Tennessee, who presided over the defendant's warrant, and preliminary hearing; the Honorable John L. Draper, presiding Judge of the Division Two, Criminal Court of Davidson County, Tennessee, who presided over the defendant's indictment, arraignment, trial, conviction, and judgment; the prosecuting attorney, who prosecuted the defendant on behalf of the state; the former public defender (Mr. James Tyre Harvon) of Davidson County, Tennessee, who represented the defendant in the case; the members of the Grand Jury; the members of the trial jury; the jury commissioner of Davidson County, Tennessee; the Clerk of the Criminal Court of Davidson County, Tennessee; and the defendant's co-defendants, for the evidentiary hearing of this motion hereof, without cost to the defendant, due to his poverty, and confinement in the Tennessee State

penitentiary, at Nashville, Tennessee, as a matter of due process of law. Moreover, subpoena the certified copy of the arrest warrant, the certified copy of the minutes of the preliminary hearing, the certified copy of the verdict-judgment, the certified copy of the court reporter's transcript of the defendant's trial proceedings of armed robbery, the certified copy of the defendant's co-defendant statement, and the certified copy of the defendant's previously petition for writ of habeas corpus, from the office of the Clerk of the Criminal Court of Davidson County, Tennessee, for the evidentiary hearing of this motion hereof, as a matter of due process of law.

IV

To grant the defendant an evidentiary hearing in person before the Bar of the Fifth Circuit Court of Davidson County, Tennessee, within ten (10) days, in respect to the allegations set forth in his motion hereof, due to the nature of the case, and his confinement in the Tennessee State Penitentiary, at Nashville, Tennessee, as a matter of due process of law.

Respectfully submitted,

/s/ William Lee Johnson
William Lee Johnson, 55249,
writ writer, on behalf of the
defendant, James Dawson, Tenn-
essee State Penitentiary, at
Nashville, Tennessee.

/s/ James Dawson
JAMES DAWSON, Defendant

Office of Clerk of the Supreme Court

I, JAMES DAWSON, Clerk of the Court, do hereby certify that the foregoing is a true, correct, and complete copy of the original of the PETITION FOR WRIT OF HABEAS CORPUS, FROM THE TRANSCRIPT OF THE FIFTH CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE, of said Court, filed and docketed on December 1st, 1961, in Case No. 100-1-100-1, JAMES DAWSON, Defendant.

AFFIDAVIT OF BEHALF OF JAMES DAWSON

James Dawson, being first duly sworn, makes oath that he is a citizen of the United States of America, and a resident of the State of Tennessee, that the foregoing motion to invalidate the conviction, and judgment of Twenty-five (25) years in the Tennessee State Penitentiary, at Nashville, Tennessee, for the crime of armed robbery, on his behalf, has been prepared, and read to him, by a writ writer, (William Joe Johnson, #53149, Tennessee State Penitentiary, at Nashville, Tennessee), without cost to him, due to his (James Dawson) ignorance of the law as to how to prepare and file the necessary papers on his own behalf, and that he is familiar with the contents therein and the same are true to the best of his knowledge, information, and belief and that he institutes this legal action in good faith, and believing himself duly entitled to the redress sought. Further, defendant makes oath that owing to his poverty, and confinement in the Tennessee State Penitentiary, at Nashville, Tennessee, he is unable to bear the cost of this motion, but is justly entitled to the redress sought, as a matter of due process of law.

1st James Dawson
JAMES DAWSON, Affiant

Sworn to and subscribed before me on this 2 th day of December, 1966.

(Seal)

1st James H. Rose
NOTARY PUBLIC

My commission expires on the 24 the day of JAN 1970.

Office of CLERK OF THE SUPREME COURT FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, RAMSEY LEATHERS, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the PETITION FOR WRIT OF HABEAS CORPUS FROM THE TRANSCRIPT OF THE FIFTH CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE, of said Court, pronounced at its December term, 1966, in case of STATE OF TENNESSEE, vs. JAMES DAWSON against C. MURRAY HENDERSON, WARDEN as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building, at Nashville, on this, the 3rd day of November, 1967.

Ramsey Leathers Clerk
By _____ Deputy Clerk